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No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The District Court did not render an opinion. Its findings of fact and conclusions of law appear in the record (R. 117–121). The opinion of the Circuit Court of Appeals (R. 135–141) is reported in 152 F. 2d 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945, and a petition for rehearing was denied on January 5, 1946 (R.

144). A petition for certiorari was filed on March 7, 1946, and was granted April 22, 1946 (R. 146). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., sec. 347).

QUESTION PRESENTED

Whether, in a proceeding under Section 8a (6) of the Agricultural Marketing Agreement Act of 1937 to enforce compliance with obligations imposed upon the defendants by a milk marketing order issued under Section 8c of the Act, the defendants, after having admitted noncompliance with the order, may assert as defenses alleged administrative errors in the determination of their obligations under the order before the administrative remedy specifically provided by Section 8c (15) has been exhausted.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. sec. 601 *et seq.*) which reenacted, with amendments, the Agricultural Adjustment Act of 1933 as amended (48 Stat. 31, 48 Stat. 670, 49 Stat. 750). The pertinent provisions of Sections 8a and 8c of the Act are as follows:

> 8a (6). The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement,

heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts. [48 Stat. 675].

* * * * *

8a (8). The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity [48 Stat. 675].

* * * * *

8c (15) (A). Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. [49 Stat. 760.]

8c (15) (B). The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested

with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15). [49 Stat. 760.]

The pertinent provisions of the Administrative Procedure Act are set forth at pp. 46, 49–50, *infra*.

The order involved is Milk Order No. 41—Chicago, Illinois, Marketing Area, issued under the

Act by the Secretary of Agriculture on June 27, 1941, effective July 1, 1941 (6 Fed. Reg. 3130), and set forth in full in the record (R. 43–65). Subsequent amendments and suspensions have been issued which are not material to this case.[1] The order was issued after a public hearing upon the basis of the evidence taken as required by Sections 8b and 8c (3) (4) of the Act. It was approved by the President following approval by a specified percentage of producers as required by Section 8c (9) of the Act (6 Fed. Reg. 3159–3160). The Secretary of Agriculture is authorized to terminate the order whenever he finds that it does not tend to effectuate the declared policy of the Act, and he is required to terminate the order upon the request of a prescribed percentage of producers (Sec. 8c (16) (A) (B)).

Order No. 41 was before this Court in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110.[2]

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[1] Amendment No. 1 was issued August 29, 1941, effective September 6, 1941, 6 Fed. Reg. 4552 (R. 65–69); and Amendment No. 2 was issued January 23, 1943, effective February 1, 1943, 8 Fed. Reg. 1258 (R. 79–83). A general amendment affecting several orders, including the Chicago Milk order, was issued June 12, 1943, effective June 21, 1943, 8 Fed. Reg. 8294 (R. 85–88). Suspensions of certain provisions of the order have been issued from time to time as set forth in 7 Fed. Reg. 10905; 8 Fed. Reg. 5358; 9 Fed. Reg. 3063, 11307; and 10 Fed. Reg. 1, 3509.

[2] The order there considered was issued August 28, 1939, effective September 1, 1939, 4 Fed. Reg. 3764 (R. 7–22). It was reissued with amendments by an order on June 21, 1940,

The purpose of the order is so to regulate the handling of milk in the Chicago Marketing Area as to effectuate the declared policy of the Act to establish and maintain the purchasing power of producers at certain specified levels (Act, secs. 2 and 8c (18) (50 Stat. 247); Order, sec. 941.0; R. 45). This is accomplished by creating and maintaining orderly marketing conditions under which all producers are required to share equitably the burden of temporary surpluses of milk which are the inevitable concomitant of a constantly adequate supply. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550.

The order fixes a use value, uniform as to all handlers, for each of four classes of milk[2] (Order, sec. 941.4, 941.5; R. 49–58). Each handler is required to report to the market administrator the quantity of milk used in each class (Order, sec. 941.3 (a); R. 48–49). The market administrator adds the use values of the milk of all handlers and the cash balance in the producer-settlement fund, divides such total by the total

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effective July 1, 1940, 5 Fed. Reg. 2337 (R. 22–43), which was in turn reissued with amendments by the order involved herein.

[2] Roughly speaking, the four classes are: I. Milk disposed of in the form of fluid milk; II. Milk disposed of in the form of flavored milk, cream, cottage cheese or ice cream; III. Milk the butterfat from which is used to produce products not specified in classes II and IV and bulk milk disposed of to bakeries, soup and candy manufacturing companies; IV. Milk the butterfat from which is used to produce butter and cheese (except cottage cheese). (R. 50.)

quantity of milk, and announces the result as a uniform price to be paid by handlers to producers (Order, sec. 941.2 (e), R. 48; sec. 941.7, R. 59–60). Certain adjustments are required to be made in the course of computation by the market administrator, including adjustments to reflect butterfat and location differentials. Additionally, the market administrator is required to subtract from what would otherwise be the uniform price not less than four cents nor more than five cents per hundredweight of milk "to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers" (Order, sec. 941.7 (b) (5); R. 60).

The variance among handlers in the percentage of milk used in a given class will normally mean that the use values for a handler may be greater or less than payments at the uniform price required to be made by him to producers. Handlers for whom there is a plus difference are required to pay the difference into a producer-settlement fund, while a handler for whom there is a minus difference is entitled to receive the difference from the fund, in accordance with a transcript of account furnished by the market administrator (Order, sec. 941.8; R. 60–62).

Each of the steps in the operation of the producer-settlement fund is required to be taken on or before a specified date during the month

immediately following the monthly delivery period. Handlers' reports must be filed not later than the 10th day (Order, sec. 941.3; R. 48–49). The announcement by the market administrator of the uniform price to producers is required to be made not later than the 14th day (Order, sec. 941.2 (e) (2); R. 48). Payments for the producer-settlement fund are required to be made by handlers to the market administrator not later than the 16th day, and payments out of the fund by the market administrator to handlers not later than the 17th day (Order, sec. 941.8; R. 60–61). Each handler must make payment of the uniform price to producers not later than the 18th day (*ibid.*) and file a report of such payment not later than the 25th day (Order, sec. 941.3 (a) (5); R. 49).

Handlers are required to keep, and to make available for inspection by the market administrator, records of their receipts and utilization of milk. The administrator is required to verify reports and payments of handlers by an audit of such records (Order, sec. 941.3 (b); R. 49). All errors must be promptly adjusted by additional payments into or out of the producer-settlement fund. Such payments by handlers into the fund must be made within five days after receipt of a bill from the administrator, and such payments to handlers out of the fund must be made by the market administrator within five days after disclosure of the error (Order, sec. 941.8 (g); R. 61–62).

STATEMENT

On September 15, 1942, the United States, the present petitioner, filed its complaint in the United States District Court for the Northern District of Illinois in which it sought to compel the respondents to comply with Order No. 41, as amended (R. 3–6). An answer was filed on November 13, 1942 (R. 70–73). A supplemental complaint* was filed on April 10, 1944 (R. 73–78), and an answer to the supplemental complaint was filed on May 8, 1944 (R. 89–95).

The material allegations of the supplemental complaint are as follows: Respondents, handlers of milk, have filed reports with the market administrator from which the market administrator has made computations and rendered respondents monthly a transcript of their account with the producer-settlement fund, all as required by Order No. 41, as amended (R. 75). In violation of Section 941.8 (e) (R. 61) of the Order (which requires each handler on or before the 16th day after the end of each delivery period

*The original complaint included Frank Ruzicka, a copartner, as a defendant and sought recovery of money due for delivery periods prior to April 1, 1942. It later appeared that Frank Ruzicka had entered the military service on April 1, 1942, and, upon request of respondents, the district court entered an order on June 25, 1943, withdrawing the case based upon the original complaint from the trial call of the court until the release of Frank Ruzicka from military service (R. 73–74). The supplemental complaint sets forth claims arising since April 1, 1942.

to make full payment to the market administrator of any debit balance "shown on the account rendered"), respondents failed and refused with respect to delivery periods from April 1, 1942, to February 29, 1944, inclusive, to make full payment of the amounts shown to be due, with the result that as of March 16, 1944, respondents were indebted to the market administrator on the basis of their filed reports in the sum of $961.27 (R. 75). The supplemental complaint further alleges that, in accordance with the requirements of the order, the market administrator audited the books and records of respondents, found deficiencies in payments to the producer-settlement fund for the delivery periods commencing April 1, 1942, and ending August 31, 1943, in the sum of $2,119.17, and billed respondents for this amount (R. 75–76). In violation of Section 941.8 (g) (R. 61–62) (which requires the handler to pay within five days "the amount so billed") respondent failed and refused to pay the billed amount (R. 76).[8]

[8] The supplemental complaint also alleged and the district court found that respondents were indebted to the market administrator for their pro rata share of the expenses of administration and for marketing services (R. 76, 119–120). Respondents' answer denied these claims (R. 92). However, after the decision of the Circuit Court of Appeals reversing the judgment of the district court, respondents paid the claimed amounts to the market administrator, and the amounts claimed for administrative expenses and marketing services are therefore not now in issue.

Respondents' answers did not deny the filing of the alleged reports with the market administrator, the receipt of the monthly transcript of their account with the producer-settlement fund based upon the reports filed, the receipt of a bill for shortages disclosed by the audit of the market administrator, or the nonpayment of the debit balance shown on the account rendered or the bill for shortages disclosed by the audit (R. 70, 89, 91). But respondents alleged that any billing by the market administrator, if properly made and applicable to respondents, was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of respondents' reports, books and records and upon findings gathered from and based upon erroneous, improper, incomplete and inaccurate tests of respondents' milk and milk products (R. 91).

Respondents' answer also affirmatively alleged: (1) the invalidity of the issuance of the order because promulgated upon insufficient and inaccurate economic facts (R. 92–93); (2) the invalidity of the continued existence of the order because of its failure to effectuate the declared policy of Congress and its conflict with the declared policy of other acts and orders promulgated thereunder (R. 93–94); and (3) the absence of an affirmative determination by the Secretary of Agriculture of the applicability of the Act and order involved to respondents (R. 94).

Respondents, after answering, petitioned the trial court to stay further proceedings until the final administrative determination of the matters in controversy between the petitioner and respondents in a proceeding under Section 8c (15) (A) of the Act then pending before the Secretary of Agriculture.[6] The petition stated that

[6] The facts in respect to the several petitions for administrative relief filed by respondents under Section 8c(15)(A), and to which they refer in their brief in opposition to the petition for certiorari (p. 7), are set forth in the two opinions which resulted. *In re Ruzicka and Ruzicka*, 3 Agr. Dec. 1049; *In re Seeley Dairy*, 4 Agr. Dec. 825.

The first petition, filed November 2, 1943, was superseded by a petition, filed May 3, 1944, which alleged inapplicability of the Act and Order to respondents, denied any obligations thereunder, challenged the economic bases of the Act and Order, and prayed, among other things, that the Secretary of Agriculture furnish respondents in writing with the "correct and true in law and in fact basis" for the Act, the Order and its amendments, their application to respondents, and their continued existence, to be supported by findings, and that the dairy industry be given representation in the administration of the milk program. An amended petition, adding allegations of errors in the market administrator's determination of respondents' obligations, was filed August 9, 1944, assistance in its preparation having been given respondents' counsel by the Solicitor's office of the Department of Agriculture in order that, as the opinion noted, the petition "might do a minimum amount of violence to the requirements of the rules of practice that petitions comply with the act and contain clear and concise allegations of illegality." *In re Ruzicka and Ruzicka*, *supra* at 1050.

A scheduled prehearing conference on this petition proved ineffective in that respondents' counsel objected that he was unaware that he was to attend a prehearing conference and refused to be bound by anything done. At the hearing, re-

the administrative proceedings would "result in the only fair determination of the rights according to the provisions of said act" and would "afford a full and complete hearing as to the amount of monies, if any, due to the funds administered by the Market Administrator" (R. 95–97). Several months later petitioner moved for judgment on the pleadings (R. 98). At the hearing on this motion respondents requested and were granted leave to withdraw the petition to stay the proceedings (R. 108). At the same hearing respondents petitioned for rules on the petitioner (1) to file a reply to the affirmative defenses in the answer; (2) for a bill of particulars as to the amount of money claimed and the basis of

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spondents' counsel noted that he had not been furnished the written information prayed for, refused to proceed on the merits of his petition, and requested a continuance pending the outcome of this case. In the first of the two opinions above cited the petition was dismissed with leave to file a new petition within thirty days. The opinion stated that respondents "seem to have refused to recognize the existence of the order and its obligations," and that running through their petitions "is a notion that the order is presumptively bad, so much so that [they] will not even deign to conduct their attack upon it until they are supplied with the 'correct in law and in fact basis' for everything about it." *Id.* at 1052.

A new petition was filed January 13, 1945, and on May 18, 1945, a motion filed by respondents, requesting that a reply to the petition be required, was heard and denied. At the hearing on May 29, 1945, respondents moved to continue the hearing to await the outcome of this case and, upon denial of this motion, requested leave to withdraw their petition. This request was granted in the second of the two opinions above cited.

the claim; (3) to strike the motion for judgment on the pleadings; and (4) to have the case set for a hearing before a jury (R. 99–106). These motions were denied (R. 116–117).

The trial court granted petitioners' motion for judgment on the pleadings (R. 117–121). It held that, in view of the admissions in the respondent's answer, there were no questions of fact properly before the Court, and "the defendants having failed to avail themselves of the administrative remedy provided by said Act, may not raise such issues of fact before this court" (R. 117). The final judgment of the district court, entered October 20, 1944, required the respondents to pay to the market administrator the sums claimed in the supplemental complaint and such additional sums as are found to be due for subsequent delivery periods down to the date of the entry of judgment and also restrained respondents from further violations of the order (R. 121–123). The court retained jurisdiction to await the outcome of the then pending administrative proceedings.

Respondents appealed to the Circuit Court of Appeals for the Seventh Circuit, which entered an order on October 30, 1945, reversing the judgment of the district court and remanding the case for further proceedings in accordance with the views expressed in the opinion (R. 142). The majority opinion held that the trial court erred in holding that respondents were not entitled to challenge the legality of the obligations imposed

by the order in a compliance proceeding (R. 135–141). Judge Kerner, dissenting from this holding, was of the opinion that Section 8c (15) provided the exclusive procedure for determining the legality of an obligation imposed under the order (R. 141). A petition for rehearing was filed on November 13, 1945, and was denied on January 5, 1946 (R. 144).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that in an enforcement action under Section 8a (6) of the Act, the district court could not, upon a showing of noncompliance, require the respondents to discharge their obligations under the Order pending exhaustion of their administrative remedy under Section 8c (15) of the Act for a modification of such obligations.

2. In holding that where the market administrator bills a handler for sums due based on filed reports, the handler is entitled to a trial on all fact issues in an enforcement action.

3. In holding that the district court was in error in refusing to permit the respondents to present evidence to show alleged error in the billings of the market administrator by reason of an inaccurate inspection or audit of respondents' records and findings based upon improper, incomplete, and inaccurate tests of respondents' milk and milk products.

4. In failing to hold that the administrative proceeding by a handler under Section 8c (15) of the Act is the sole remedy to settle disputes with respect to the legality of obligations imposed on the handler under a milk order.

5. In failing to hold that Section 8a (6) of the Act, in the light of the mandate expressed in Section 8c (15) thereof, authorizes the district court to direct compliance by a handler pending a determination of factual issues by the Secretary of Agriculture in the administrative proceeding established by the Act.

6. In ruling that Section 8a (8) of the Act tends to substantiate a belief that Congress did not mean to make the administrative remedy exclusive.

7. In holding that the word "may" in Section 8c (15) of the Act indicates congressional intent that the administrative remedy is permissive rather than exclusive.

8. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The Agricultural Marketing Agreement Act contemplates that, in the primary interest of producers and upon their approval, the Secretary of Agriculture may issue a milk marketing order whose immediate impact falls upon handlers. The

review and enforcement provisions of the Act disclose a carefully planned pattern for judicial control designed to accommodate the public interest in enforcement of an order and the private interest of handlers in obtaining an equitable and expeditious determination of their obligations. For such determination, Section 8c (15) provides an administrative forum as a means of utilizing the specialized experience of an expert body in achieving a uniform solution of problems which are frequently of great factual complexity. To enable the Government to maintain the continuity and integrity of the program established by the order during the pendency of proceedings before the administrative forum, Section 8a (6) authorizes proceedings by the Government in the appropriate district courts to compel obedience to the terms of an order.

This careful accommodation of public and private interests would be practically nullified if, as the court below held, a handler is permitted to defend an enforcement proceeding on the basis of matters as to which he had a clear and unpursued remedy before the administrative forum. The marketing program created by a milk order is a sensitive mechanism dependent as a practical matter upon substantial compliance by all handlers in the marketing area; it may be broken down by recalcitrant handlers if they are permitted to interject such defenses in enforcement proceedings

and thus prevent the prompt compliance essential to successful operation of the intricate provisions of milk marketing orders. The scheme of the Act would be further violated since the special advantages of the administrative forum created by Congress for the initial solution of problems incident to the application of milk orders would in large measure be lost if courts were required to decide these problems unaided by prior administrative determination.

The exclusivity of the administrative forum not only follows from consideration of the Act as a whole but is also required by specific phraseology. Section 8c (15) (B) provides that the pendency of administrative proceedings instituted by a handler shall not "impede, hinder or delay" an enforcement proceeding by the Government, but that the enforcement proceeding shall abate whenever a final decision has been rendered in the proceedings commenced before the administrative forum. This provision is comprehensible only on the basis that Congress intended the administrative forum as the exclusive one for determination of handlers' obligations. Moreover, Section 8a (8) provides for the non-exclusivity of the Government's remedies, but the Act significantly omits so to provide in respect of the handler's administrative review.

II

The interpretation of the Act here urged is supported by the rule which requires exhaustion of

an available administrative remedy before permitting a litigant to invoke judicial powers. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The considerations which underlie the rule appear identical whether it is applied to a plaintiff or defendant, and it has in fact been applied to a defendant in a criminal proceeding. *Bradley* v. *Richmond*, 227 U. S. 477.

III

While the Government urges that a proper construction of the Act requires that no defenses are available as to which there is an administrative remedy, the present case does not require decision as to the availability of defenses based upon unconstitutionality of, or lack of statutory authority for, a milk order. The alleged errors in audits of respondents' records and in tests of their milk, were not simply mathematical miscalculations, but were concerned with the utilization and testing of milk—technical matters which the administrative forum is particularly qualified to determine and as to which the doctrine of exhaustion of administrative remedy is peculiarly applicable. Imposition of this principle does not in any way prejudice the rights of handlers, since the fund for the correction of errors which the Market Administrator is required to maintain assures payment of any amount which is found to be owing to a handler.

IV

The Administrative Procedure Act, passed after this court granted certiorari, is inapplicable here, both because the statute was not meant to affect cases which have reached the appellate stage before its enactment, and because it does not alter the previous law as to judicial review in any respect material here.

ARGUMENT

I

THE ACT PROVIDES AN EXCLUSIVE ADMINISTRATIVE FORUM TO WHICH HANDLERS ARE CONFINED FOR A DETERMINATION OF THEIR OBLIGATIONS UNDER MARKETING ORDERS

A consideration of the Agricultural Marketing Agreement Act as a whole clearly discloses the intention of Congress to make the administrative forum the exclusive one for determination of the extremely complex factual problems certain to arise in the administration of the Act. The statutory review and enforcement provisions present a rounded scheme in which, for the benefit of private parties, the administrative forum is provided as an equitable and expeditious method for safeguarding their rights and in which, for the benefit of the Government, enforcement proceedings in the courts are provided to enable maintenance of the functioning of marketing programs while private rights are being tested before the administrative forum.

The Act can be considered only in the light of the factual situation and the general problems with which it sought to deal. A primary motivation of the Act was the milk problem,[7] an "exquisitely complicated" one.[8] This Court has noted the difficulties of the problem and has summarized its history in decisions sustaining both State and Federal action designed to solve or ameliorate it. *Nebbia* v. *New York*, 291 U. S. 502; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

The solution which Congress achieved in the Agricultural Marketing Agreement Act has been upheld by this Court in its substantive provisions as against various challenges. *United States* v. *Rock Royal Co-operative, Inc., supra; H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The construction now placed on its procedural provisions by the Circuit Court of Appeals, if permitted to stand, will substantially undermine operations under the Act since a sufficient number of recalcitrant handlers would be in a position to prevent effective operation of orders issued pursuant to it.

In view of the requisites necessary to issuance

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[7] Sections 8c (5) and 8c (18) concern exclusively milk marketing problems (see 81 Cong. Rec. 3594, 4963, 4969).

[8] *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 974 (C. C. A. 2).

of an order, it is plain that Congress must have had in mind the possible difficulty of enforcing the marketing orders contemplated by the Act due to lack of support by or actual hostility of handlers. The Act, as is evident from its declaration of policy, was framed primarily in the interests of producers, but its immediate impact perforce falls upon handlers. A milk order may be issued by the Secretary of Agriculture if handlers of not less than 50% in volume of the commodity sign a marketing agreement, and the order is approved by two-thirds of the producers or by producers of two-thirds in volume (Sec. 8c (8)). However, notwithstanding the failure or refusal of the requisite percentage of handlers to sign a marketing agreement, the Secretary may issue an order, with the approval of the President, if he determines that the handlers' refusal to sign tends to prevent effectuation of the Act's policy and that issuance of the order is the only practicable means of aiding producers and is approved by two-thirds of producers or by producers of two-thirds in volume (Sec. 8c (9)). The Act thus affirmatively contemplates the issuance of orders which a majority of handlers have failed or refused to approve, and the problem of appropriate enforcement remedies, which at the same time preserve the rights of handlers, is thus explicitly posed.

The enforcement and administrative-review provisions which the Act now contains were

described by both the Senate Committee on Agriculture and Forestry and the House Committee on Agriculture as intended to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms."[9] Care was taken to safeguard fully the rights of all handlers affected by the issuance of orders under the Act. Under Section 8c (15) (A) "any handler subject to an order may file a written petition with the Secretary," objecting to such order or its application to him. The Secretary is then required to afford him a hearing under regulations to be prescribed,[10] and, after such hearing, to make a ruling upon the handler's petition. The appropriate federal district courts are vested by subparagraph (B) with jurisdiction to review such ruling to determine whether it is "in accordance with law."

Equal care was taken by Congress to assure that the program established by any marketing order could not be broken down by litigious noncompliance. Section 8a (6) vests the several district courts "with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order" issued pursuant to the

[9] S. Rep. No. 1011, p. 14, H. Rep. No. 1241, p. 14, 74th Cong., 1st sess.

[10] The Secretary's regulations governing the administrative review procedure are set out in 6 Fed. Reg. 6570–6582; 7 C. F. R. Cumulative Supplement, par. 900.50 *et seq.*

Act. It is further provided in paragraph (8) that the remedies set forth in Section 8a "shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity." Congress thus made clear its recognition of the enforcement problem as one of major importance in providing the strong and unusual remedy of mandatory injunction [11] to force compliance under Section 8a (6), and by specifically stipulating that it should not be exclusive.

It is submitted that the statutory design would be violated and partially nullified by an interpretation permitting a handler to interpose to an enforcement proceeding any and all possible defenses, including matters as to which he has a clear and unpursued administrative remedy with subsequent access to the courts. Sections 8c (15) and 8a (6) are, in effect, complementary. The former was specifically intended to afford persons affected by orders a complete and exclusive manner of testing their rights; the latter was intended to enable the Government to maintain the program while the administrative remedy was being pursued.

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[11] In *United States* v. *Adler's Creamery, Inc.*, 110 F. 2d 482 (C. C. A. 2), certiorari denied, 311 U. S. 657, it was ineffectually contended that it was inequitable to compel payment of money into the producer-settlement fund by mandatory injunction.

Establishment of the producer-settlement fund or its equivalent is affirmatively contemplated by the Act.[12] Its successful operation is directly dependent, as a practical matter, upon prompt compliance by all handlers with the requirements of an order. The Secretary of Agriculture believes that the successful operation of the Chicago order and other milk orders is due in major part to the fact that the courts, in enforcement proceedings, have refused to pass upon the validity of obligations imposed upon handlers by the milk orders.

The producer-settlement fund, commonly referred to as an equalization pool, is characterized by a symmetry which makes it extremely sensitive to the slightest disturbance in operation. The default of a single handler causes an immediate breach in the equalization of cost to handlers and a reduction in price to producers.[13] The unfair advantage gained by a defaulting handler is such as to constitute a strong inducement to his competitors to make similar defaults. The time required for enforcement proceedings against handlers permitted to interpose all defenses might

[12] Section 8c (5) provides that in the case of milk, orders shall contain one or more of certain terms or conditions among which are provision of "a method for making adjustments in payments, as among handlers * * *, to the end that the total sums paid by each handler shall equal" the use values of the milk purchased by him.

[13] See *supra*, pp. 6–7, for the method of computing the uniform price payable to producers.

result in inability to procure sufficient funds to enable the equalization pool to operate effectively.

If a noncomplying handler knows that, irrespective of the period of noncompliance and of failure to proceed to procure administrative relief, all defenses are available in an enforcement proceeding, there will be no incentive to proceed under Section 8c (15). The provisions for an administrative remedy and judicial review may thus be practically nullified. The questions which may be involved in determining the legality of the obligations imposed by these orders are so complex and technical that their correct, uniform and prompt decision requires the informed judgment and accumulated experience of a specialized forum.

The view of congressional intent compelled by a consideration of the Act as a whole is reinforced by specific phraseology. Section 8c (15) (B) provides that "the pendency of proceedings instituted [by a handler] pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to Section 8a (6)" of the Act. And "any proceedings brought pursuant to section 8a (6) * * * shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

These explicit provisions are comprehensible only on the basis that Congress intended the remedy available to handlers under subsection (15) to be their exclusive method for testing the obligations of orders. The provision that any injunction obtained in an enforcement proceeding shall abate upon completion of proceedings under subsection (15) shows that where administrative relief is sought enforcement proceedings under Section 8a (6) were primarily important as a means of preserving effective operation of orders during the pendency of the proceeding. In a proceeding under Section 8c (15) (B) the Government is permitted to seek permanent injunctive relief under Section 8a (6) by way of counterclaim.

A construction permitting the present type of defense in an enforcement proceeding would lead to anomalies. It would be necessary to assume that Congress, having created a specialized forum, would authorize district courts concurrently to consider the very problems delegated to the specialized forum, and this despite the recognized complexities of marketing problems and the manifest need for an informed administrative tribunal to bring special competence to bear on the factual problems involved. Moreover, the ruling of the Secretary might be appealed to the same district court, which would then have before it the identical question in two proceedings, one as an

original matter and one on review. Or two district courts might be concurrently and properly considering the identical question between the same parties. The different records compiled before the judicial and administrative forums or the requirement that the district court accord finality to the Secretary's determination of facts might create irreconcilable conflicts.[14]

It cannot be supposed that Congress intended to countenance a situation which is the antithesis of orderly procedure. The exclusivity of the administrative forum for the initial determination of the handler's asserted rights is plainly required to avoid such a possibility. Concurrent proceedings before the administrative and judicial forums also create the opportunity for playing one forum

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[14] Factual problems in which the findings of the Secretary have been sustained in review proceedings have involved the relative merits of milk from Holstein and Guernsey cows (*New York State Guernsey Breeders Co-op.* v. *Wickard*, 141 F. 2d 805 (C. C. A. 2), certiorari denied, 323 U. S. 725); the classification of cream added to buttermilk to improve its quality (*Waddington Milk Co.* v. *Wickard*, 140 F. 2d 97 (C. C. A. 2)); whether refrigerating rooms in which a dairy company placed cream before delivery to purchasers constituted a "second plant." (*Wetmiller Dairy & Farm Products Co.* v. *Wickard*, 149 F. 2d 330 (C. C. A. 2)); the reasonableness of a line of demarkation drawn 31 miles from the center of the marketing area within which a receiving station allowance may not be deducted by a milk handler (*Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860 (C. C. A. 3); and whether buttermilk is an "homogenized mixture" (*M. H. Renken Dairy Co.* v. *Wickard*, 45 F. Supp. 332 (E. D. N. Y.)).

against the other for delay or other purposes. Congress did not intend to give the violator of an order the option of testing its validity administratively or in the enforcement court. The history of this case itself sufficiently illustrates the possibilities. Respondents on two occasions requested continuances of proceedings before the administrative forum to await the outcome of this case, and once petitioned the district court for a stay of proceedings before it pending determination by the administrative forum on petitions before it (*supra*, pp. 12–13).

It should be observed that respondents are in no manner harmed or prejudiced by being required to resort to the administrative forum for determination of the present controversy. The Secretary's regulations governing the administrative review procedure set no limit upon the time within which a handler shall petition for modification of an order or of his obligations under an order.[15] The milk order provides for the contingency of relief to handlers in an administrative proceeding by making a cash reserve each month in connection with the operation of the producer-settlement fund (Order, Sec. 941.7 (b) (5); R. 60). At the time of entry of judgment in this case, the cash balance on hand for this general purpose was $102,418.05.[16]

[15] Secretary's Regulations, 6 Fed. Reg. 6570–6582, particularly Regulation 900.52; 7 C. F. R. Cumulative Supplement, par. 900.52.

[16] Monthly publication entitled: *Statistical Summary with*

None of the three arguments which the court below enumerated (R. 138–141) in favor of its interpretation are persuasive. The provision of Section 8a (8) that the remedies provided *in that section* are non-exclusive does not substantiate a belief that Congress thereby indicated a general tendency to make all special statutory remedies non-exclusive. This provision is limited by its express terms to Section 8a, which afforded remedies to the Government only and, in fact, is a congressional recognition of the difficulties of the enforcement problem and the necessity for according unusual powers to the Government to meet it. The fact that Congress stipulated that procedural provisions inserted primarily for protection of the Government were not exclusive and failed so to stipulate with respect to procedural provisions (Section 8c (15)) inserted primarily for protection of private parties, suggests very strongly that the latter provisions are exclusive.

Nor is it of any significance that Section 8c (15) (A) in providing administrative relief for the handler, states that he "may" petition the Secretary of Agriculture. No inference is thereby created that this remedial provision is one of several available to the handler which he *may* use in preference to some other. Use of the

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Price Computations, November 16, 1944, Federal Milk Market Administrator, Chicago, Illinois, Marketing Area, United States Secretary of Agriculture.

permissive "may" rather than the mandatory "shall" is obviously required since otherwise every handler, though satisfied with an order, would be ordered by the Act to petition for some modification of that order or its application to him.

Finally, the court observed that the "statute recognizes the possibility of concurrency of remedies" (R. 138). But this avoids the question, since the statute recognizes only the Government's need for summary enforcement proceedings during the period in which any issues raised by a handler in the orderly method provided by the statute are determined through administrative proceedings and judicial review thereof. The court apparently based its view on the requirement that the decree in an enforcement proceeding abates upon conclusion of proceedings instituted in the administrative forum, which requirement of itself establishes the supremacy, and therefore the exclusivity of, the latter proceedings for the adjudication of the grievances of handlers.

The court below, while enumerating the foregoing arguments, placed primary reliance on what it considered to be the failure of Congress to say in *haec verba* that the administrative proceedings should be the sole and exclusive remedy open to handlers (R. 140–141). This view overlooks the congressional intention, manifest both

from a consideration of the Act as a whole and from the statutory provisions already mentioned, which concretely evidence the purpose to make administrative proceedings under Section 8c the exclusive forum for initial determination of handlers' grievances, by providing (1) that the administrative review should not impede, hinder, or delay enforcement proceedings, (2) that enforcement proceedings shall abate on conclusion of proceedings instituted in the administrative forum, and (3) that the enforcement remedies given the Government shall be nonexclusive while significantly omitting so to provide in respect of the relief through administrative review given to the handler. In the light of settled judicial principles considered in Point II, Congress may have considered more explicit phraseology both unnecessary and unduly hampering.

II

THE CONSTRUCTION URGED BY THE GOVERNMENT IS SUPPORTED BY ESTABLISHED PRINCIPLES OF JUDICIAL ADMINISTRATION

It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. The doctrine involves a policy of orderly procedure which favors a preliminary administrative sifting process (*Federal Trade*

Commission v. *Claire Furnace Co.*, 274 U. S. 160, 174), which is particularly desirable with respect to matters peculiarly within the competence of the administrative authority (*Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 311), or where uniformity is essential to comply with the purposes of the regulatory statute (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125). The doctrine serves to prevent attempts "to swamp the courts by a resort to them in the first instance." *United States* v. *Sing Tuck*, 194 U. S. 161, 170.

Apart from the decision of the court below in the present case, the lower federal courts, after recognizing that the Agricultural Marketing Agreement Act by its terms gives supremacy to the administrative remedy, have uniformly applied the above rule in refusing to permit defenses of the type here asserted in an enforcement proceeding under Section 8a (6).[17]

While it is true that the rule is usually applied to a plaintiff, the controlling considerations as

[17] *LaVerne Co-op Citrus Ass'n* v. *United States*, 143 F. 2d 415 (C. C. A. 9); *United States* v. *Ridgeland Creamery Co.*, 47 F. Supp. 145 (W. D. Wis.); *United States* v. *Hogansburg Milk Co.*, 57 F. Supp. 297 (N. D. N. Y.); *United States* v. *Wood*, 61 F. Supp. 175 (D. Mass.); *United States* v. *Burlington Sanitary Milk Co., Inc.*, decided October 16, 1944 (E. D. Wis., unreported); cf. *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209, 229 (E. D. Mo.). See *United States* v. *Superior Court*, 19 Cal. 2d 189, 120 P. 2d 26.

expressed in recent cases appear identical in their application whether the party against which the rule is invoked is a plaintiff or a defendant. See *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 342; *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 311; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 404; *Macauley* v. *Waterman S. S. Corp.,* No. 435, October Term, 1945, slip op., pp. 2–3). As the Circuit Court of Appeals for the Ninth Circuit noted in *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415, 420:

> The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act.

The rule has in fact been applied even to a defendant in a criminal proceeding. In *Bradley* v. *Richmond,* 227 U. S. 477, a defendant convicted for violation of a municipal ordinance forbidding the conduct of certain businesses without a license was not permitted to defend on the basis of his alleged discriminatory classification since he had failed to pursue an available administrative remedy where the alleged error in classification

could have been presented and, if necessary, corrected. As pointed out in *Yakus* v. *United States*, 321 U. S. 414, 445, it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of these orders. *United States* v. *Corrick*, 298 U. S. 435, 440; *White* v. *Johnson*, 282 U. S. 367, 373–374.[18]

Even though Congress has not provided for judicial review of the final administrative determination, a defendant in a criminal proceeding for violation of the Selective Service Act cannot set up as a defense asserted errors of the administrative body until he has exhausted the remedy available to him within the administrative scheme. *Falbo* v. *United States*, 320 U. S. 549; *Estep* v.

[18] The United States has successfully enjoined the continued operation of a radio broadcaster whose application for renewal of license the Federal Radio Commission refused to grant. The broadcaster was not permitted to attack the order of the Commission without first exhausting the remedy afforded by the Radio Act. *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C. C. A. 7), certiorari denied, 285 U. S. 538. In granting an injunction restraining violation of a wage order promulgated under the Fair Labor Standards Act, the court refused to consider attacks on the validity of the wage order and its applications to defendants, on the ground that the Act provided an administrative procedure for such attacks. *Walling* v. *Cohen*, 48 F. Supp. 859 (E. D. Pa.), affirmed, 140 F. 2d 453 (C. C. A. 3).

United States, No. 292, decided Feb. 4, 1946; *Billings* v. *Truesdell*, 321 U. S. 542, 558. There is no constitutional objection to the application of the doctrine to a defendant, though he is thereby prevented from setting up as a defense to an indictment for violation of a regulation the alleged unconstitutionality of the regulation and its application to him. *Yakus* v. *United States, supra.* See *Lockerty* v. *Phillips*, 319 U. S. 182; *Bowles* v. *Willingham*, 321 U. S. 503.

The *Rock Royal* and *Wrightwood Dairy* cases do not support a view contrary to that here advanced. In both cases, though the Government was successful in forcing handlers to comply with the provisions of milk orders, this Court fully considered, before rejecting, contentions by the defendants asserting unconstitutionality of the orders or their application, or lack of statutory authority for such orders. However, the Government did not in either case object to this Court's consideration of these questions on the basis of the principles now under discussion since in the early years of enforcing milk orders it was obviously desirable as a practical matter to settle speedily the important questions of constitutional and statutory law. Questions which merely lurk in the record, and which are neither brought to the Court's attention nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 279.

It is also to be noted that this Court need not here determine whether enforcement proceedings may be defended on the basis of well-pleaded constitutional or statutory objections to orders issued under the Act, such as were considered in the *Rock Royal* and *Wrightwood* cases. In the *La-Verne* case, *supra*, at p. 420, the court specifically stated that it was not determining whether an infirmity *apparent on the face of the order* would constitute a valid defense.[19] The Government has contended that a proper construction of the Act requires a holding that no defenses are available in an enforcement proceeding which may be raised in the administrative forum, but, if this Court should not agree, then it is plain that the defenses of which respondents here seek to avail themselves are of a type which render peculiarly applicable the principle of judicial administration which would require their reference to the administrative forum for determination.

III

THE DEFENSE WHICH RESPONDENTS SEEK TO RAISE HERE IS APPROPRIATE FOR PRIOR ADMINISTRATIVE DETERMINATION

The single defense of possible merit is that any billing by the market administrator was based upon an audit of respondents' records and upon

[19] Cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 168, where the Court remarked "• • • it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."

tests of their milk and milk products which were erroneous and incomplete. It has been specifically determined that such a defense, challenging the market administrator's determination of the handler's obligations, may not be raised in an enforcement proceeding, but may only be made the subject of a petition for administrative relief. *United States* v. *Ridgeland Creamery Company, United States* v. *Hogansburg Milk Company, United States* v. *Wood,* all *supra,* note 17, p. 33. It is readily apparent, in view of the manner in which a milk order is necessarily administered, that a defense of this character opens a wide range of problems of precisely the type for solution of which the specialized experience of the administrative body is particularly necessary.

Under the terms of the Order, a handler is compelled to submit reports respecting milk receipts and utilization in the detail and on forms prescribed by the market administrator (Order, Section 941.3 (a); R. 27–28). The market administrator is required to "verify all reports and payments of each handler by audit of such handler's records" and by tests of the handler's milk and milk products (Order, Section 941.3 (b); R. 28). The determination of a handler's obligations to the producer-settlement fund may thus take initial form from an inspection of the handler's reports, but it must be finally based upon the results of the market administrator's verification

by audit and tests.[20] A defense alleging, but not particularizing, errors in the audits and tests is therefore hardly less than a general denial of any obligation to the producer-settlement fund.

Were a defense of so general a nature permitted in an enforcement proceeding, the courts would necessarily find themselves considering as an original matter intricate and complex problems of milk accounting and economics, as may be illustrated by cases decided by the administrative forum upon petitions for relief under Section 8c (15) (A). Thus, the alleged error in the market administrator's audit might involve his reclassification of milk utilization which turned upon a decision as to the proper temperature at which frozen cream should be stored (*In the Matter of the Petition of Breakstone Bros., Inc.*, 1 Agr. Dec. 26). Or the audit might be challenged on the basis of the conversion factor adopted by the market administrator in determining the milk equivalent in pounds of a 40 quart can of 40 percent cream (*In re Dellwood Dairy Co., Inc.*, 3 Agr. Dec. 1053). Tests of milk for butterfat content may engender controversy on whether

[20] The importance of the verification is obvious; it has been said that "everyone will concede that the efficacy of a classified price plan of milk marketing depends upon adequate checking of handlers' reports to insure their accuracy and truthfulness." (*In re Ferndale Farms, Inc.*, 4 Agr. Dec. 275, 284).

representative and sufficient sampling is assured (*In re Ogden Dairy Co.*, 2 Agr. Dec. 558).[21]

The particular errors which these respondents believe the Market Administrator to have committed in his verification of their reports may be surmised from their petitions for administrative relief previously noted. (*Supra*, note 6, p. 12.) The errors complained of in the amended petition of August 9, 1944 (which the later petition incorporated by reference), included alleged error in the reclassification of milk utilization resulting from the Market Administrator's failure to accept respondents' records, particularly with respect to butter sales,[22] allegedly incomplete and inaccurate spot-tests of the butterfat content of respondents' milk, and alleged impropriety in discounting the weight of chocolate milk due to

[21] For additional examples of alleged errors in the market administrator's verification which have been considered on petitions for administrative relief, see *In the Matter of the Petition of Ladysmith Milk Producers' Cooperative Association*, 1 Agr. Dec. 1; *In the Matter of the Petition of M. H. Renken Dairy Company*, 1 Agr. Dec. 6; *In re International Dairy Company*, 3 Agr. Dec. 953; *In re Hogansburg Milk Co.*, 4 Agr. Dec. 285; *In re Dairymen's League Cooperative Ass'n, Inc.*, 5 Agr. Dec. 143.

[22] The handler's failure to keep records adequate to enable the market administrator to verify a claimed utilization of milk has been frequently held to justify a reclassification of such milk utilization. See *In re Lemont Dairy Company*, 4 Agr. Dec. 913, and decisions cited. Although "it is not necessary that a handler's records contain absolute proof of the reported utilization of milk * * * something more is required than mere unsupported memoranda which cannot be checked for accuracy or veracity." *Id.* at 921.

the inclusion of other ingredients.[23] These objections obviously are not to mechanical calculations; they relate to matters of milk utilization and testing with respect to which there is good reason for requiring submission to an administrator having specialized experience in the field.

It is unreasonable to suppose that Congress in-

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[23] Paragraph 5 of the amended petition (in which respondents herein are "petitioners") reads in part as follows:

"5. Petitioners further complain of the manner of the application of the said Act, orders and regulations, with reference to the use of classification of milk and milk products received, processed and distributed by them; petitioners more specifically complain of the use classification made by the Milk Market Administrator with reference to the following:

"a. The disallowance by the Milk Market Administrator of many and varied sales made by the petitioners at the place of business in Chicago and commonly referred to as "store sales."

"b. The refusal without cause of the Milk Market Administrator to accept the books, records and testimony of the petitioners with reference to the operation of their business and specifically to the form of the milk and milk products sold by petitioners.

"c. Errors in the utilization audit made by the Milk Market Administrator in disregarding information furnished the Milk Market Administrator by the petitioners as to the nature of their business activities.

"d. Errors made by the Milk Market Administrator in 'spot testing' the butterfat content of the milk and milk products purchased, processed and sold by petitioners; petitioners state that said laboratory tests of the butterfat content were inaccurate and incomplete; that a reclassification of the use of said milk and milk products is therefore erroneous and improper;

"e. The refusal by the Milk Market Administrator to ac-

tended problems of this character arising from alleged errors in the market administrator's determination of a handler's obligations to be judicially considered in other than the manner carefully provided pursuant to section 8c (15) and following administrative review. Section 8c (15) (A) provides for administrative review not only of an "order" and its "provisions" but of "any obligation imposed in connection therewith." It cannot be doubted that in the use of this phrase Congress intended specifically to cover the familiar type of obligation to pay assessments into the producer-settlement fund, as that obligation is determined by the market administrator. Creation of the administrative forum would have been pointless, and its special advantages will be lost, if handlers are free to ignore orders of the Secretary of Agriculture and determinations of obligations thereunder by the market administrator, and then resist enforcement proceedings with a defense of the type here relied upon. The provisions of the Act for administrative review may be practically nullified at the very stage in the administration of the Act when the principal controversial questions are no longer constitutional but factual in nature.

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cept the books, records and testimony of petitioners with reference to volume of butter production.

"f. The discounting by the Milk Market Administrator of the weight of chocolate milk due to other ingredients, said discount being an estimate and based upon inaccurate and incomplete information."

Other purported defenses to the present action set up in respondent's answer are based on an alleged lack of economic justification for the order and its conflict with other economic policies assertedly pursued by the Government (R. 92–94). Plainly, these defenses are not matters for judicial cognizance. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *United States* v. *Morgan*, 313 U. S. 409, 417. The Circuit Court of Appeals did not refer in its opinion to any of respondents' so-called "affirmative defenses" (R. 108), but relied wholely on the fact that respondents were precluded by the district court from presenting evidence which allegedly would show error in the market administrator's vertification of respondent's reports (R. 135).

The opinion of this Court in *Stark* v. *Wickard*, 321 U. S. 288, persuasively suggests a rounded interpretation of the Act which would preclude respondents' use in an enforcement proceeding of the defenses here relied upon. The *Stark* case held that a *producer* had standing to question in court the statutory authority of the Secretary to issue an order in respect of matters in which the producer had a specific interest and which he could not raise administratively. The reasoning of the Court indicates that standing to sue would have been denied had the question been merely one of alleged administrative errors in enforcing an order and had an administrative remedy been available.

The problem before the Court was basically one of interpretation, since the Court recognized that the producers' standing to sue depended on "the nature and character of the legislation" (p. 306). While the *Stark* case involved a producer as plaintiff rather than a handler as defendant, the manner in which the Court relied on the *Rock Royal* case (similar to the present one as involving a handler as defendant) suggests that the broad question of statutory interpretation is not basically dissimilar.

Congressional intent to authorize the suit was inferentially interpreted by the Court as being restricted to instances in which the challenge was to constitutional or statutory authority or in which no administrative remedy was available. The Court said (p. 309):

> Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority of the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction.

Further indication that this Court interpreted the Act as restricting suit in the manner suggested

is apparent from its answer to the Government's contention that allowance of the suit would open wide the avenues of litigation. The Court noted, among other answers (p. 310):

> The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid act. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. Technical details of the milk business are left to the Secretary and his aides.

The combined effect of the *Stark* and *Rock Royal* cases, then, discloses a general pattern of construction of the Act which, at a minimum, precludes parties directly affected by an order from challenging the order by initiating suit or defending an enforcement proceeding on any grounds other than patent lack of authority for the order or absence of an administrative remedy.

IV

THE ADMINISTRATIVE PROCEDURE ACT IS NOT APPLICABLE TO THIS CASE, AND EVEN IF IT WERE APPLICABLE, IT WOULD NOT CHANGE THE RESULT REQUIRED BY THE AGRICULTURAL MARKETING AGREEMENT ACT

A. *The Act does not apply to cases decided in the lower courts before it was enacted.*

The questions here involved are not affected in any way by the Administrative Procedure Act (c. 324, Public Law 404, 79th Cong., 2d Sess., approved by the President, June 11, 1946). It seems clear that the Act is not applicable to this case, as it did not become effective until Septem-

ber 11, 1946,[24] at which time this case was pending on writ of certiorari before this Court. Congress evinced no intent that the Act should operate retroactively. On the contrary, a congressional intent that the Act should operate prospectively only is indicated by the exception in Section 12, which provides that "no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." Although the definition of "agency proceeding" contained in Section 2 appears not to include a judicial enforcement proceeding brought by an agency, it would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.

This Court early announced and has frequently reiterated that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Heth*, 3 Cranch. 399, 413.

[24] Section 12 of the Act provides that it "shall take effect three months after its approval except that * * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

Ordinarily statutes must be considered as establishing rules for the future and they will not be applied retrospectively unless such a purpose plainly appears. *Brewster* v. *Gage*, 280 U. S. 327, 337. This rule of construction is one of "general application" which "has been applied by this Court to statutes governing procedure." *United States* v. *St. Louis S. F. & T. Ry.*, 270 U. S. 1, 3.[23]

There is no reason here to depart from this salutary and well-established rule of statutory construction, particularly since it must be assumed that Congress legislated in the light of this familiar principle. If respondents' defense to this suit was improper when tendered, as the Government has contended, a determination that that defense has now been rendered proper by the provisions of the Administrative Procedure Act would constitute a retroactive application of that Act. Congress nowhere evidenced any intention that the Act should be so applied to pending litigation as to require an appellate court to reverse as erroneous a lower court decision which was proper when rendered.

It is, of course, generally true that the function of an appellate court is to apply the law as it

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[23] For examples of cases in which this principle has been applied, see *United States Fidelity and Guaranty Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 316; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577; *Winifree* v. *Northern Pacific Railway Co.*, 227 U. S. 296, 301; *Hassett* v. *Welch*, 303 U. S. 303, 314.

exists at the time of its decision and that "if, subsequent to the judgment [of the lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States* v. *Schooner Peggy*, 1 Cranch 103, 110. That principle has been followed by this Court in instances where the intervening statute was expressly made applicable to litigation then pending (*Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23) or where the lower court was required to follow state law which was changed pending appeal (*Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538).

But the question here presented is one of statutory construction which must be answered before the principle above set forth has any application. Congress has not specifically declared that the Act should be applicable to pending litigation but has implied the contrary. Nothing in the purpose of the Act requires that it apply to cases which have almost run their full course before the Act was passed; the Act was not designed to unsettle pending litigation, but to set standards for the future. In the absence of a plain declaration that it should be so applied, normal canons of statutory construction require that it operate only in respect of actions to arise subsequent to its effective date, and at least not so as to raise for the first time on review new questions as to the

propriety of previously rendered lower court decisions.[26]

B. The Administrative Procedure Act would not require a different conclusion.

Even if the Act were applicable, the pertinent provision respecting enforcement proceedings is only a restatement of existing law and would require the present questions to be determined, as before, by the provisions of the Agricultural Marketing Agreement Act. The applicable provision is Section 10 (b), which reads in its entirety as follows:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> * * * * *
>
> (b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in

[26] In respect of the Government's contention that the Act is not retroactively operative, it will be noted that Section 10 (b) is couched in normal terms of futurity, and in referring to "civil or criminal proceedings" significantly fails to add the commonplace phrase "now or hereafter pending." We need look no further than Section 8a (6) here under consideration for an example of customary draftsmanship when procedural statutes are intended to apply to pending cases. The powers conferred upon district courts to enforce compliance with the Agricultural Marketing Agreement Act are granted "in any proceeding now pending or hereafter brought."

> any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

The Government has shown that Section 8c (15) of the Agricultural Marketing Agreement Act was intended to provide an "exclusive" opportunity for judicial review of the administrative action the respondents seek to challenge in this case.[27] The adequacy of that opportunity would appear to be beyond dispute. The section also provides an opportunity to initiate a review pro-

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[27] In this connection, it is noteworthy that the legislative history of Section 10 (b) clearly negatives any view that the opportunity for judicial review provided by law must be expressly labeled as "exclusive". Both the House and Senate Committees on the Judiciary, in their final reports on the bill which became the Administrative Procedure Act unchanged in this respect, state in identical language: "The exception from 'prior, adequate and exclusive * * * review' in the second sentence is operative only where statutes, *either expressly or as they are interpreted*, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." [Italics added.] S. Rep. No. 752, pp. 26–27, H. Rep. No. 1980, p. 42, 79th Cong., 2d sess.

ceeding "prior" to the institution of an action to enforce the provisions of an order. As soon as a handler concludes that any order, any provision thereof, or any obligation imposed in connection therewith is not in accordance with law he may initiate an administrative proceeding that will culminate in judicial review in the District Court. Since the Government could not bring a suit to restrain violations until after it had ascertained that a handler was not in compliance, the handler plainly will have an opportunity to institute an administrative proceeding before an enforcement proceeding can be commenced.[28] And in this case it is clear that respondents had a "prior opportunity." Their dispute with the Marketing Administrator is clearly of long standing, and, at least from the time of the filing of the original complaint in September 1942 (R. 3),[29] they knew of his claims and could have instituted an administrative proceeding to review the questions raised by the dispute. This is all the "prior opportunity" which Section 10 (b) requires.

It is true that, although in this case it would appear that respondent had ample time in which

[28] In such a proceeding, he doubtless can apply to the Secretary for a stay of the administrative order *pendente lite*. Cf. *Yakus* v. *United States*, 321 U. S. 414, at 438–439.

[29] Before the institution of the suit, the Marketing Administrator had made demands for payment, which respondents had refused (R. 5–6), so that respondents doubtless could have begun review proceedings before the filing of the complaint.

to have instituted and probably even completed an administrative and judicial review of the matter in question before the commencement of the enforcement suit, the Marketing Agreement Act recognizes that situations will arise in carrying out the program which require immediate action, and the Government is authorized to initiate an enforcement proceeding (Section 8a (6)) before judicial review sought by a handler in a Section 8c (15) proceeding has been completed. It should be noted, however, that any judgment of the court enforcing a marketing order is designed primarily to insure the continued operation of the order pending a final determination as to its validity in the review proceeding, and the Act provides that the judgment enforcing the order will be subject to abatement upon completion of judicial review.[30] If review of the order is sought in the manner prescribed by the statute the judgment of enforcement does not differ in substance from an injunction *pendente lite* such as courts commonly grant without first determining the merits of a case. The opportunity afforded a handler to initiate a

[30] Sec. 8c (14) also provides that if in an action brought to invoke the penalties provided by that section the court finds that a petition pursuant to subsection (15) was filed and prosecuted in good faith, no penalty shall be imposed for such violation as occurred between the date upon which the defendant's petition was filed and the date upon which notice of the Secretary's ruling thereon was given to the defendant.

judicial review proceeding as soon as aggrieved and the limitation placed upon any interim enforcement order that may be issued provide a prior opportunity for judicial review within the meaning of the exception in Section 10 (b) of the Administrative Procedure Act. This fully protects the handler.

To construe Section 10 (b) to mean that all defenses may be raised in an enforcement action unless a judicial review proceeding brought by the handler has been concluded (or the handler has been given an "opportunity" to conclude it) prior to the initiation of the suit for enforcement would make effective administration of the Agricultural Marketing Agreement Act impossible. A sufficient number of recalcitrant handlers would be able to prevent the effective operation of marketing orders issued pursuant to the Act, the Government might be unable to enforce compliance with the orders for long periods of time pending the completion of proceedings invoked to test their validity, the carefully prescribed provisions for an administrative remedy and judicial review would be practically nullified because there would be no incentive to proceed under Section 8c (15), and the courts would be burdened with the obligation of determining the many complex and technical questions involved in the administration of milk orders without benefit of the informed judgment and accumulated experience of the specialized forum provided by the Act.

Handlers could completely destroy the administrative procedure specified in the statute by awaiting enforcement suits in which they could raise all defenses without first submitting them to the Secretary. An intention to make such a drastic change in the system established by the Agricultural Marketing Agreement Act should not be ascribed to Congress in the absence of compelling evidence.

Certainly, the legislative history underlying Section 10 (b) negatives any intention on the part of Congress to make such a sweeping change. The Senate Committee on the Judiciary reported that the sentence governing judicial review in enforcement proceedings quoted above "states the present rule as to enforcement proceedings."[31] The sponsor of the bill in the House, in the course of debate immediately preceding the bill's passage, explained that the provisions of Section 10 (b) "summarize the situation as it is now generally understood. The section does not disturb special procedures which Congress has provided * * *" (92 Cong. Rec. 5759).[32] These views accord with those expressed by the Attorney General in re-

[31] The statement appears in the committee print of the bill introduced in the Senate by Senator McCarran on January 6, 1945, which carried with it an explanation of the bill's features.

[32] The Senate debates do not contain any specific reference to the particular language here under discussion. The final Committee reports include only the explanation quoted *supra* at page 50.

sponding to a request for his comments on the bill. He noted that Section 10 (b) "in general declares the existing law concerning judicial review," and with particular reference to the provision in question he stated (S. Rep. No. 752, 79th Cong., 2d sess., pp. 43-44):

> The final sentence of the subsection indicates that the question of the validity of an agency action may arise in a court proceeding to enforce the agency action. The statutes presently provide various procedures for judicial enforcement of agency action, and nothing in this act is intended to disturb those procedures.

Carl McFarland, Chairman of the Committee on Administrative Procedure of the American Bar Association, which actively sponsored the bill, also indicated during the committee hearings that the judicial review provisions of the Administrative Procedure Act were not intended to alter existing law. Hearings before House Committee on the Judiciary, 79th Cong., 1st sess. (1945), *Federal Administrative Procedure*, pp. 37-38.

The first sentence of Section 10 (b) specifically provides that the form of statutory review shall be any special statutory review procedure that may be applicable. It would be unlikely if after this approval in the first sentence of specific methods of review such as are contained in Section 8c (15) of the Marketing Agreement Act, Congress intended the reference in the second

sentence to a prior opportunity for judicial review to nullify that procedure, particularly when such action would jeopardize the administration of the substantive program to which the procedure is applicable. Such a construction is not necessary because the procedural provisions of the two acts can be given a consistent construction.

This conclusion is reinforced by the introductory clauses to Section 10 which qualify all that follows. Section 10 as a whole is applicable "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *". We believe that we have shown that, before the passage of the Administrative Procedure Act, the Marketing Agreement Act was intended to preclude judicial review except in so far as proceedings under Section 8c (15) were concerned. The introductory qualification to Section 10 manifests a legislative intention that such a limitation upon judicial review continue to be recognized. Where Congress has precluded all judicial review, the second sentence of Section 10 (b) does not operate to create review; where Congress has precluded all but a special type of review, that preclusion is reaffirmed by the opening clause of Section 10.

An interpretation contrary to the one urged here might have drastic and incalculable effects on the methods for judicial review of administra-

tive action that Congress authorized in particular instances and specifically declared to be exclusive. It is hard to believe that Congress thus determined in blunderbuss fashion to jeopardize the exclusivity of the various methods of obtaining review that it carefully incorporated in many statutes requiring administration. In particular instances Congress has provided for judicial review of agency action exclusively by the circuit courts of appeals or by the courts of the District of Columbia, or by special statutory three-judge courts, and it is particularly difficult to believe that the considerations which motivated Congress to provide these exclusive methods should not obtain if, fortuitously, the agency found it necessary to bring enforcement proceedings to prevent a statutory program from being impaired or rendered ineffective pending the completion of the process of review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the judgment of the District Court.

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